

**TITLE 2. ADMINISTRATION  
DIVISION 7. SECRETARY OF STATE**

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**EMERGENCY REGULATIONS**

**Finding of Emergency**

The Secretary of State finds that an emergency continues to exist, and that readoption for 90 days of the attached regulations, which are substantially equivalent to the emergency regulations previously adopted by the Secretary of State, is necessary for the immediate preservation of the public peace, health and safety, or general welfare, as required by subdivision (b) of Section 11346.1 of the Government Code.

**Specific Facts Showing the Need for Immediate Action**

Overview: The Secretary of State reasonably believed that the Post Election Manual Tally Requirements (PEMT) were not regulations subject to the requirements of the Administrative Procedure Act (APA), Government Code section 11340 et seq. In forming this view, the Secretary relied on the advice of counsel and subsequently on a Superior Court decision in a case challenging her authority to issue the PEMT. On August 29, 2008, the Court of Appeal upheld the Superior Court's ruling that the Secretary has authority to require post election manual tallies as a condition of voting system certification, but reversed the trial court's ruling on the APA issue. See *County of San Diego v. Debra Bowen* (2008) 166 Cal.App.4<sup>th</sup> 501. By then, it was too late to promulgate the PEMT as permanent regulations through the full APA process and have them in effect for the November 4, 2008, General Election.

Soon after taking office in January 2007, Secretary of State Debra Bowen, pursuant to the authority granted by section 19222 of the Elections Code, initiated an in-depth scientific review of voting systems previously approved for use in California elections. The project came to be known as the Top-To-Bottom Review (TTBR).

On August 3, 2007, the Secretary of State made compliance with forthcoming post-election manual tally requirements a condition of re-approval of each of the voting systems examined in the TTBR. At that time, the Secretary did not believe such requirements would constitute regulations subject to the requirements of the APA. This belief was based in part upon the decision of the United States District Court for the Central District of California in *American Association of People with Disabilities v. Shelley*. On October 25, 2007, the Secretary issued the written requirements. Two months passed before San Diego County sought a judicial determination that the Secretary of State did not have the authority to impose the PEMT and, in the alternative, that the PEMT were regulations subject to the APA. On January 22, 2008, the Superior Court denied the Counties' request for relief. The trial court entered judgment on March 7, 2008. The Counties filed a Joint Notice of Appeal on March 19, 2008.

On August 29, 2008, the Court of Appeal upheld the trial court's ruling that the Secretary of State had authority to make the PEMT a condition of re-approval of voting systems following the TTBR. The Court of Appeal reversed the trial court's ruling on the APA issue, holding that the PEMT were regulations subject to the requirements of the APA. The APA process typically requires at least four months before permanent regulations become effective, more if there are substantive changes to the proposed regulations during the process. Had the Secretary of State filed the proposed PEMT regulations with the Office of Administrative Law the day following the court decision, there would not have been enough time to complete the full APA process and have the PEMT in effect as permanent regulations in time for the November 4, 2008, General Election.

The TTBR showed that voting systems in widespread use throughout California are vulnerable to error and tampering. Escalating post election hand counts of ballots cast in randomly selected precincts are essential to confirm the correctness of the results reported by these voting systems, particularly in contests in which the apparent margin of victory is quite small. The PEMT were successfully implemented by the handful of counties in which close contests triggered their use following the June 3, 2008, Statewide Primary Election.

On October 20, 2008, the Office of Administrative Law (OAL) approved the Emergency Regulations on Post Election Manual Tallies (PEMT Emergency Regulations) submitted by the Secretary of State. The PEMT Emergency Regulations were filed with the Secretary of State and became effective immediately for a period of 180 days ending April 17, 2009. The PEMT Emergency Regulations were successfully implemented by 41 counties in which close contests triggered their use following the November 4, 2008, General Election.

Since adoption of the PEMT Emergency Regulations, the Secretary of State has made substantial progress and proceeded with diligence toward compliance with subdivision (e) of section 11346.1 of the Government Code. In January 2009, the Secretary of State established a Post Election Manual Tally Regulations Working Group (PEMT Working Group), consisting of elections officials from nine California counties, for the purpose of identifying improvements that could be made to the PEMT Emergency Regulations before they are submitted to OAL as proposed permanent regulations. The Working Group has met via conference call regularly for the past eight weeks and has provided substantial input and reviewed several sets of proposed revisions to the PEMT Emergency Regulations. The Working Group will continue to convene until the Secretary of State adopts permanent regulations. In addition, the Secretary of State has carefully evaluated the individual reports submitted by the 41 counties that conducted PEMT audits after the November 4, 2008, General Election, for the purpose of determining whether to make adjustments to the PEMT Emergency Regulations to improve cost-effectiveness before they are adopted as permanent regulations. The Secretary of State has also sought and received comments from a number of interested parties, including local elections officials aside from those serving on the PEMT Working Group, election integrity advocates, and specialists in the post-election auditing field.

During this process of developing appropriate revisions, the state Legislature reached an agreement on the state budget deficit, approved a set of budget measures to be placed on the statewide ballot, and called a Statewide Special Election for May 19, 2009. However, as noted

above, the PEMT Emergency Regulations are set to expire on April 17, 2009.

While the Secretary of State has made substantial progress and proceeded with diligence toward the adoption of permanent regulations, the Secretary of State and interested parties are still in the process of finalizing appropriate revisions to the PEMT Emergency Regulations for adoption as permanent regulations. Therefore, permanent regulations will not be in place in time for the May 19, 2009, election.

Unless the attached regulations, which are substantially equivalent to the PEMT Emergency Regulations previously adopted by the Secretary of State, are readopted for an additional 90 days and in effect as emergency regulations for the May 19, 2009, Statewide Special Election, the accuracy and integrity of the results in close contests, as well as public confidence in those results, could be compromised.

Accordingly, immediate action is required to readopt these regulations on an emergency basis.

### **Authority and Reference**

Authority: Section 12172.5, Government Code and Sections 10, 19200, 19201, 19205, 19222, Elections Code.

Reference: Sections 19200, 19201, 19205, 19222, Elections Code.

### **Informative Digest**

In 2007, the Secretary retained the University of California and a team of computer security experts to evaluate the security, reliability and accessibility of voting systems approved for use in California. Upon completion of this review, on August 3, 2007, the Secretary withdrew her approval of the voting systems studied by the review team, including certain Diebold, Sequoia and Hart InterCivic voting systems. The Secretary simultaneously issued a conditional re-approval of each of the voting systems that set forth approximately 40 preconditions to their use.

One of the conditions common to each of the re-approvals required the counties that chose to use the machines subject to the TTBR to follow, "post-election manual count auditing requirements," in addition to those already required by statute. The conditional re-approvals were amended on October 25, 2007, with the post election manual count condition revised to state this point more precisely: "Elections officials must comply with . . . requirements as set forth by the Secretary of State in the document entitled 'Post-Election Manual Tally Requirements' and any successor document." That same day, the Secretary issued a stand-alone document entitled "Post-Election Manual Tally Requirements" (the PEMT).

On December 18, 2007, the County of San Diego and Deborah Seiler, in her official capacity as the Registrar of Voters for the County of San Diego (County of San Diego), filed a complaint for declaratory and injunctive relief and a petition for writ of mandate in the superior court, asking the court to void the PEMT. County of San Diego argued that the Secretary had overstepped her

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statutory authority in issuing the PEMT and that, even if she possessed the authority to issue the PEMT, she could only do so pursuant to the APA. In January 2008, the parties stipulated to permitting the counties of Kern, Riverside and San Bernardino to intervene in the case.

On January 22, 2008, the Superior Court denied the counties' request for relief. The court concluded that the Secretary had acted within her legislatively delegated authority in issuing the challenged requirements, and that because the PEMT did not constitute a "regulation," the Secretary was not required to comply with the APA. The trial court entered judgment on March 7, 2008. The counties filed a Joint Notice of Appeal on March 19, 2008. They also filed a motion seeking expedited review and a decision in the appeal prior to the November 4, 2008, election. The Court of Appeal granted the motion to expedite. On August 29, 2008, 66 days before the election, the Court of Appeal issued its decision. The court upheld the trial court's ruling that the Secretary has authority to issue the PEMT. The court reversed the trial court's ruling that the PEMT were not regulations and therefore not subject to the APA.

On October 20, 2008, the Office of Administrative Law (OAL) approved Emergency Regulations on Post Election Manual Tallies (PEMT Emergency Regulations) submitted by the Secretary of State. The PEMT Emergency Regulations were filed with the Secretary of State and became effective immediately for a period of 180 days ending April 17, 2009. The PEMT Emergency Regulations were successfully implemented by 41 counties in which close contests triggered their use following the November 4, 2008, General Election.

The PEMT Emergency Regulations set forth a comprehensive post election manual tally procedure, requiring that: (i) "Elections officials shall conduct a manual tally of 10% of randomly selected precincts for any contest where the margin of victory is less than one half of one percent (0.5%); (ii) in contests that span multiple jurisdictions (e.g., statewide contests); "if the margin of victory within a given jurisdiction is more than 0.5%, but the overall margin . . . is less than 0.5%, then each jurisdiction involved in the contest shall conduct a manual tally of 10% of the precincts in which voters cast ballots for that contest in the jurisdiction"; (iii) "additional precincts shall be tallied in randomly selected blocks of five percent (5%) until the total number of variances presumed to exist . . . is smaller than ten percent (10%) of the overall margin of victory in that contest . . . or until all ballots have been manually tallied, whichever occurs first; and (iv) the tallies "must be completed within the canvass period established by Elections Code § 10262 and § 15372." See Elections Code sections 335.5 [defining " 'official canvass' "] and 353.5 [defining 'semifinal official canvass' "].

The attached regulations, proposed for a 90-day readoption, are substantially equivalent to the PEMT Emergency Regulations. The attached regulations require: (i) "Elections officials shall conduct a manual tally . . . where the margin of victory is less than one half of one percent (0.5%), as follows: For statewide contests . . . two percent (2%) . . . For legislative and Congressional contests, and any contest involving 100 precincts or more . . . five percent (5%) . . . For any contest involving fewer than 100 precincts . . . ten percent (10%) of randomly selected precincts; (ii) in contests that span multiple jurisdictions (e.g., statewide contests), if the margin of victory within a given jurisdiction is more than 0.5%, but the overall margin is less than 0.5%, then each jurisdiction involved in the contest shall conduct a manual tally of a percentage of the precincts in which voters cast ballots for that contest in the jurisdiction, with the percentage

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depending on the size of the contest (see above); (iii) "additional precincts shall be tallied in randomly selected blocks of five percent (5%) until the total number of variances presumed to exist . . . is smaller than one half (50%) of the overall margin of victory in that contest . . . or until all ballots have been manually tallied, whichever occurs first; and (iv) the tallies must be completed within the canvass period established by Elections Code § 10262 and § 15372. See Elections Code sections 335.5 [defining " 'official canvass' "] and 353.5 [defining 'semifinal official canvass' "].

The modifications reflected in the attached regulations are as follows:

- Reduction in the initial sample size from ten percent (10%) down to five percent (5%) for large contests and down to two percent (2%) for statewide contests.
- Reduction in the requirement to count additional precincts (escalation), by increasing rate of variances permitted – from ten percent (10%) to half (50%) of the overall margin of victory – before escalation is required.
- Technical and non-substantive modifications to clarify definitions and provisions and to ensure consistent use of terms throughout the regulations.

These modifications do not substantially change the overall structure of the PEMT Emergency Regulations, which continue to require: (i) a manual tally of a percentage of precincts for all contests with an overall margin of victory of less than one half of one percent (0.5%); (ii) equivalent requirements for contests that span multiple jurisdictions; (iii) escalation in blocks of five percent (5%) where significant variances are found; and (iv) completion within the canvass period. Therefore, the attached regulations are substantially equivalent to previously adopted PEMT Emergency Regulations, as required by subdivision (h) of section 11346.1 of the Government Code.

#### **Identification of Each Technical, Theoretical, and Empirical Study, Report, or Similar Document On Which the Secretary of State Relies**

In proposing these emergency regulations, the Secretary of State relies upon the following documents:

- TTBR Red Team report on Premier Voting Solutions/Diebold, available at [http://www.sos.ca.gov/elections/elections\\_vsr.htm](http://www.sos.ca.gov/elections/elections_vsr.htm)
- TTBR Red Team report on Sequoia Voting Systems, available at [http://www.sos.ca.gov/elections/elections\\_vsr.htm](http://www.sos.ca.gov/elections/elections_vsr.htm)
- TTBR Red Team report on Hart InterCivic, available at [http://www.sos.ca.gov/elections/elections\\_vsr.htm](http://www.sos.ca.gov/elections/elections_vsr.htm)
- ES&S Red Team report, available at [http://www.sos.ca.gov/elections/elections\\_vs\\_ess.htm](http://www.sos.ca.gov/elections/elections_vs_ess.htm)
- TTBR Source Code Team report on Premier Voting Solutions/Diebold, available at [http://www.sos.ca.gov/elections/elections\\_vsr.htm](http://www.sos.ca.gov/elections/elections_vsr.htm)
- TTBR Source Code Team report on Sequoia Voting Systems, available at [http://www.sos.ca.gov/elections/elections\\_vsr.htm](http://www.sos.ca.gov/elections/elections_vsr.htm)
- TTBR Source Code Team report on Hart InterCivic, available at

- [http://www.sos.ca.gov/elections/elections\\_vsr.htm](http://www.sos.ca.gov/elections/elections_vsr.htm)
- ES&S Source Code report, available at [http://www.sos.ca.gov/elections/elections\\_vs\\_ess.htm](http://www.sos.ca.gov/elections/elections_vs_ess.htm)
- Source Code report on Sequoia Voting System 4.0, available at [http://www.sos.ca.gov/elections/elections\\_vs\\_sequoia.htm](http://www.sos.ca.gov/elections/elections_vs_sequoia.htm)
- Post-Election Audit Standards Working Group report, available at [http://www.sos.ca.gov/elections/elections\\_peas.htm](http://www.sos.ca.gov/elections/elections_peas.htm)

### **Local Mandate Determination**

**Mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement under Part 7 (commencing with Section 17500) of Division 4 of the Government Code:** The Secretary of State has determined that the proposed regulations will impose a reimbursable mandate on those counties where narrow margins of victory require Post Election Manual Tallies pursuant to the regulations.

### **Fiscal Impact Estimate**

In submitting these regulations to the Office of Administrative Law, the Secretary of State incorporates form STD 399, a copy of which is attached to this document.

**Cost or savings to any state agency:** The Secretary of State has determined that the proposed regulations will not impose an additional cost to the Secretary of State or any other state agency.

**Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code:** The Secretary of State has determined that the proposed regulations may impose a cost on local elections offices, depending on whether a given jurisdiction has one or more contests in which the margin of victory is less than 0.5% according to the semifinal official results. In the June 2008, Primary Election, counties reported costs ranging from a low of \$160 to a high of \$9,131. In the November 2008, General Election, jurisdictions reported costs ranging from zero to a high of approximately \$248,000. However, the attached regulations will reduce costs incurred by local elections officials in future elections because of the reduced sample sizes and reduced escalation requirement.

In general, the PEMT Emergency Regulations are triggered only in a very small fraction of contests on each ballot – those contests with a margin of victory of less than one half of one percent (0.5%), based on the semifinal official results.

**Other non-discretionary cost or savings imposed upon local agencies:** The Secretary of State has determined that the proposed regulations will not impose other non-discretionary costs or savings upon local agencies.

**Cost or savings in federal funding to the state:** The Secretary of State has determined that the proposed regulations will not result in cost or savings in federal funding to the state.